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October 20, 2014

By E-mail and ECF

The Honorable Katherine B. Forrest
Daniel Patrick Moynihan United
States Courthouse
500 Pearl Street
New York, NY 10007-1312

Allianz Risk Transfer AG, et al. v. *Paramount Pictures Corporation*,
No. 08-CV-10420 (KBF)

Dear Judge Forrest:

This firm, together with Kendall, Brill and Kleiger LLP, represents the defendant, Paramount Pictures Corporation ("Paramount") in this action. We write briefly in response to plaintiffs' letter in support of their Rule 39(b) motion, because it fundamentally misapprehends the law in this Circuit.

As the authorities cited in our letter of earlier this afternoon make clear, the Second Circuit, for cases initially filed in federal court, has adopted a "rigid rule" prohibiting the revival of a jury trial right once waived, where that waiver, as it does here, stems from mere inadvertence. *Alvarado* v. *Santana-Lopez*, 101 F.R.D. 367, 368 (S.D.N.Y. 1984). That rule derives from Judge Friendly's opinion in *Noonan* v. *Cunard S.S. Co.*, 375 F.2d 69, 70 (2d Cir. 1970). And to be clear, in their letter plaintiffs offer no reason for their failure to assert their jury trial rights. There is no reason, then, under *Noonan*, to permit the belated jury trial demand. This should be the end of the inquiry.

What plaintiffs' letter fails to explain is that there are *two* lines of authority in this Circuit under Rule 39(b). The Court of Appeals made this clear in *Cascone* v. *Ortho Pharmaceutical Corp.*, 702 F.3d 389, 393 (2d Cir. 1983). There, the court expressly held that *Noonan* "shall continue to govern cases where it is applicable," but further held that there was more "play in the joints" for cases removed from New York Supreme Court. *Id.* The courts in the Second Circuit have shown greater solicitude for belated jury demands, and applied a multi-factor test, in cases removed from New York Supreme Court because CPLR § 4102(a) provides that a jury demand can be made at any time up to the filing of the pre-trial note of issue.

The multi-factor test cited by plaintiffs in their letter has its roots in *Higgins* v. *Boeing Co.*, 526 F.2d 1004 (2d Cir 1975), a case that was removed from New York Supreme Court, and indeed plaintiffs' own authorities—which themselves include removed cases, applying the test with its roots in *Higgins*—make that very clear. *See, e.g., Gold & Rosenblatt LLC* v. *JP Morgan Chase, N.A.*, 2012 WL 1624032, at *1 (A case removed from New York Supreme Court, in which the court rejected the "more stringent" *Noonan* standard because the case was not filed in federal court in the first instance, and held that that "[t]he Court applies a case-by-case approach in determining whether to allow a late-filed jury demand in *removed* cases" (emphasis added) (citing *Cascone*)); *see also Encarnacion* v. *Isabella Geriatric Center*, 2014 WL 4494160 (S.D.N.Y. Sept. 11, 2014) (applying multi-factor test in a case *removed* from New York Supreme Court, and noting the distinction between the two standards).

In addition, plaintiffs offer an exceedingly cramped and illogical interpretation of the Subscription Agreement. Clearly, in this suit, the plaintiffs are enforcing what they believe are their rights under the securities at issue.

For all of these reasons, and the reasons set forth in our earlier letter, plaintiffs' Rule 39(b) motion should be denied.

Respectfully submitted,

Allan J. Arffa

cc: All counsel of record (by e-mail)